Ting Khai Sin & Ors v Public Prosecutor and other appeals

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS Q-05–242–09 OF 2012, Q-05–243–09 OF 2012, Q-05–244–09 OF 2012 AND Q-05–290–11 OF 2012
MOHAMAD ARIFF, ROHANA YUSUF AND HAMID SULTAN JJCA
3 SEPTEMBER 2014

Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused persons convicted for kidnapping and sentenced to life imprisonment — Whether charge known to accused persons — Whether ransom clearly made out — Whether failure to convict for lesser charge of extortion — Whether there was common intention — Kidnapping Act 1961 s 3

This was the appellants' appeals against conviction and sentence of life imprisonment for kidnapping. The appellants were jointly charged for kidnaping the victim for the purpose of getting ransom money in the sum of RM250,000, an offence under s 3(1) of the Kindnapping Act 1961 ('the Act'). On 17 July 2010 at around 9am, Wong Tee Yong ('PW1') was driving to her son's school when her car was knocked from behind. She alighted from the car and saw a man ('the third accused') coming out from the car behind that knocked against her car. The third accused told PW1 that he would compensate her for the damage of her car. He also told her that the other passengers in his car were his siblings. The third accused told PW1 that his cousin had a workshop and he could send her car there that same day for repair. After the third accused's persuasion, PW1 agreed to let the third accused's alleged sister and brother (later identified as the first and fourth accused, respectively) accompany her to the school and then send the car for repair. The fourth accused told PW1 the location of the workshop and while they were on the way to the workshop, the phone of the fourth accused rang. After talking on the phone, the fourth accused told PW1 that he could help to send the car to the workshop after sending her home first. He then asked her to drive the car to a particular Petronas petrol kiosk. When the car reached the Petronas petrol kiosk, PW1 saw that the third accused was already there. The third accused told PW1 to get into his car as he would send her home while the first accused would send PW1's car to the workshop. PW1 surrendered her car key to the first accused before getting into the third accused's car. After driving a short distance, the third accused suddenly snatched PW1's handbag while the front seat passenger pushed her head down. The two men sitting beside her grabbed her hands, pulled them behind her back and tied them, they also gagged her mouth and tied her legs. They blind folded her and made her 'lie face down'. The car continued to travel for some distance before PW1 heard the sound of an automatic gate open. She was then placed inside a gunny sack, lifted up and

brought inside a house. While inside the house, PW1 was placed face down on a mattress on the floor, the gunny sack was opened and the gag was removed. She was blindfolded. They proceeded to forcefully remove her ring, necklace and watch. When PW1 asked them why they brought her there, a person who sounded like the third accused told her that his father was hospitalised and he needed RM250,000 to save his father's life. They made PW1 telephoned many of her relatives to ask them to bank money into either her bank account or the accounts given by them. Then they went to withdraw the money from various bank accounts with the ATM cards. PW1 was subsequently released in the evening of the same day. The accused told her that they had left a black colour bag inside her car and instructed her to throw it into a drain. PW1 made a police report and an investigation ensued where the first accused went to the police station and was subsequently arrested. The police later arrested nine other persons including the second, third and fourth accused. The appellants argued that the charge was unknown to the appellants; the ransom was not clearly made out; the failure to convict for lesser charge of extortion; and there was no common intention.

Held, dismissing the appeal:

(1) There was no merit in the submission or the technicalities raised. The law does not require the exact sum asked or paid to be stated in the charge. The exact sum was not also an element of the offence. Once a person is abducted and ransom is asked for release, a charge under s 3 of the Act is attracted. There were ample evidences to say s 3 is applicable and it did not really matter what the trial judge had to say and that could not be taken up as technical issues to obtain an acquittal unless it could be shown a miscarriage of justice had occurred in consequence of any error or omission of the trial judge (see paras 12–13).

(2) There was no evidence that the money allegedly demanded was as consideration for the release of the complainant. This issue was related to the 'preliminaries' and the money asked was for the purpose not to harm the victim's children. Common sense will dictate if not for the ransom she will not be released. Conduct and motive under s 8 of the Evidence Act 1950 will clearly bring nexus to the demand, consideration and the release of the victim. The conduct of the appellants on this issue was inextricably interwoven to anchor the charge as well as culpability. This was not a case where the ransom had no nexus to her release (see paras 14–15).

(3) There was no duty and obligation for the trial judge to consider a lesser offence when the evidence was sufficient to attract s 3 of the Kidnapping Act 1961. This was not a case where the prosecution had offered an alternative charge. The obligation to consider a lesser charge would only be applicable if the prosecution had not established its case beyond

reasonable doubt as per the charge but the learned trial judge takes the view that there are sufficient evidence to attract a lesser charge. The law does not permit the appellant to demand a lesser charge when the prosecution has established its case beyond reasonable doubt as per the charge (see para 17).

(4) Prearranged plan is not necessity element. What is important in this case is that the first appellant has nexus and participated in the conduct of the other appellants during the relevant period of the crime to attract criminal liability. The evidence does not exonerate the first appellant at all from the crime (see para 19).

[Bahasa Malaysia summary

Ini adalah rayuan perayu-perayu terhadap sabitan dan hukuman penjara seumur hidup kerana menculik. Perayu-perayu didakwa bersama kerana menculik mangsa untuk tujuan mendapatkan wang tebusan dalam jumlah RM250,000, suatu kesalahan di bawah s 3(1) Akta Penculikan 1961 ('Akta'). Pada 17 Julai lebih kurang 9 pagi, Wong Tee Yong ('PW1') memandu ke sekolah anak lelakinya apabila keretanya dilanggar dari belakang. Dia turun daripada kereta dan nampak seorang lelaki ('tertuduh ketiga') keluar dari kereta di belakangnya yang melanggar keretanya. Tertuduh ketiga memberitahu PW1 bahawa dia akan membayar pampasan kepadanya bagi kerosakan keretanya. Dia juga memberitahu PW1 bahawa lain-lain penumpang di dalam keretanya adalah adik-beradiknya. Tertuduh ketiga memberitahu PW1 bahawa saudaranya mempunyai bengkel dan dia boleh menghantar kereta PW1 ke sana pada hari yang sama untuk dibaiki. Selepas pujukan tertuduh ketiga, PW1 bersetuju untuk membenarkan yang dikatakan adik-beradik perempuan dan lelaki tertuduh ketiga (kemudian dikenal pasti sebagai tertuduh pertama dan keempat, masing-masing) menemaninya ke sekolah dan menghantar kereta untuk dibaiki. Tertuduh keempat memberitahu PW1 lokasi bengkel dan semasa mereka menuju ke bengkel, telefon tertuduh keempat berbunyi. Selepas bercakap di telefon, tertuduh keempat memberitahu PW1 bahawa dia boleh menghantar kereta ke bengkel selepas menghantarnya pulang ke rumah terlebih dahulu. Dia kemudiannya meminta PW1 untuk memandu kereta ke petrol kiosk Petronas yang tertentu. Apabila sampai di petrol kiosk Petronas, PW1 melihat tertuduh ketiga sudah berada di sana. Tertuduh ketika memberitahu PW1 untuk menaiki keretanya kerana dia akan menghantar PW1 pulang ke rumah manakala tertuduh pertama akan menghantar kereta PW1 ke bengkel. PW1 menyerahkan kunci keretanya kepada tertuduh pertama sebelum memasuki kereta tertuduh ketiga. Setelah memandu dalam jarak pendek, tertuduh ketiga tiba-tiba merampas tas tangan PW1 manakala penumpang di tempat duduk hadapan penumpang menolak kepalanya ke bawah. Kedua-dua lelaki yang duduk di sebelahnya memegang tangannya, menariknya ke belakang dan mengikat tangannya, mereka juga menyumbat mulutnya dan mengikat kakinya. Mereka mengikat mata PW1 dan

membuatkannya 'lie face down'. Kereta terus dipandu untuk beberapa jarak sebelum PW1 mendengar bunyi pagar automatik dibuka. Dia kemudiannya diletakkan dalam karung guni, diangkat dan dibawa masuk ke dalam sebuah rumah. Semasa di dalam rumah, muka PW1 dihadapkan ke bawah di atas tilam yang berada di atas lantai, karung guni dibuka dan lelucon dikeluarkan. Matanya ditutup. Mereka terus secara paksa membuka cincin, rantai dan jamnya. PW1 bertanya mengapa mereka membawanya ke situ, seseorang yang bersuara seperti tertuduh ketiga memberitahunya bahawa ayahnya terlantar di hospital dan dia memerlukan RM250,000 untuk menyelamatkan nyawa ayahnya. Mereka memaksa PW1 menghubungi ramai saudara-maranya untuk menyuruh mereka memasukkan wang ke dalam akaun PW1 atau akaun yang diberi oleh mereka. Mereka kemudian pergi mengeluarkan wang daripada pelbagai akaun bank menggunakan kad ATM. PW1 kemudiannya dilepaskan pada petang hari yang sama. Tertuduh memberitahu kepadanya bahawa mereka telah meninggalkan beg berwarna hitam di dalam keretanya dan mengarahkannya untuk membuang beg tersebut ke longkang. PW1 membuat laporan polis dan siasatan telah berlaku di mana tertuduh pertama pergi ke balai polis dan kemudiannya ditahan. Polis kemudian menahan sembilan orang lain termasuk tertuduh kedua, ketiga dan keempat. Perayu berhujah bahawa pertuduhan itu tidak diketahui oleh perayu-perayu; tebusan itu tidak dibuat dengan jelas; kegagalan untuk mensabitkan untuk dakwaan lebih kecil terhadap pemerasan; dan tidak ada niat bersama.

Diputuskan, menolak rayuan:

(1) Tiada merit dalam penghujahan atau alasan-alasan teknik yang dibangkitkan. Undang-undang tidak memerlukan untuk jumlah tepat yang diminta atau dibayar untuk dikemukakan di dalam dakwaan. Jumlah tepat juga bukanlah elemen kepada kesalahan. Sekali seseorang diculik dan tebusan diminta untuk pelepasan, suatu dakwaan di bawah s 3 Akta terpakai. Terdapat keterangan yang mencukupi untuk mengatakan s 3 terpakai dan tidak kisah apa yang dikatakan oleh hakim bicara dan bahawa tidak boleh dijadikan sebagai isu-isu teknikal untuk mendapatkan pelepasan kecuali ia boleh menunjukkan salah laksana keadilan telah berlaku akibat apa-apa khilaf atau peninggalan oleh hakim bicara (lihat perenggan 12–13).

(2) Tiada keterangan bahawa wang dikatakan dituntut adalah sebagai balasan untuk pelepasan pengadu. Isu ini berkaitan 'preliminaries' dan wang diminta adalah bagi tujuan tidak mengapa-apakan anak mangsa. Fikiran waras mengatakan jika tidak kerana tebusan dia tidak akan dilepaskan. Kelakuan dan motif di bawah s 8 Akta Keterangan 1950 jelas akan menunjukkan hubungan terhadap tuntutan, balasan dan pelepasan mangsa. Kelakuan perayu-perayu dalam isu ini adalah jelas saling berkait untuk mengukuhkan dakwaan dan kebersalahan. Ini bukanlah suatu kes

yang mana wang tebusan tidak berkaitan dengan pelepasannya (lihat perenggan 14–15).

(3) Tiada kewajipan dan tanggungjawab untuk hakim bicara mempertimbangkan dua kesalahan apabila keterangan mencukupi untuk mengguna pakai s 3 Akta Penculikan 1961. Ini bukanlah kes di mana pendakwaan telah menawarkan dakwaan alternatif. Tanggungjawab untuk mempertimbangkan antara dua dakwaan hanya boleh diguna pakai jika pendakwaan tidak membuktikan kesnya melampaui keraguan munasabah terhadap dakwaan tersebut (lihat perenggan 17).

(4) Pelan pra-atur bukanlah elemen penting. Apa yang penting dalam kes ini adalah perayu pertama mempunyai hubungan dan mengambil bahagian dalam kelakuan perayu-perayu lain semasa tempoh jenayah yang relevan untuk menyebabkan tanggungan jenayah (lihat perenggan 19).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 288–371.

Cases referred to

Chin Kek Shen v PP [2013] 5 MLJ 827, CA (refd)
Mohamad Radhi bin Yakoob v PP [1991] 3 MLJ 169, SC (refd)
PP v Ini Abong and other trials [2008] 8 MLJ 106; [2008] 1 LNS 526, HC (refd)
PP v Mohd Aszzid Abdullah [2008] 1 MLJ 281, HC (refd)
Ravindran a/l Ramasamy v PP [2013] 4 MLJ 665, CA (refd)
Tong Kam Yew & Anor v PP [2013] 4 MLJ 888, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60
Evidence Act 1950 s 8
Kidnapping Act 1961 ss 2, 3

Appeal from: Criminal Trial No SB-45–3 of 2011 (High Court, Sibu)

Wee Wui Kiat (Battenberg & Talma Advocates) in Criminal Appeal No Q-05–242–09 of 2012 for the first appellant.
David Kuok Han Peh (Wong, Orlando Chuah & Kuok) in Criminal Appeal No Q-05–243–09 of 2012 for the second appellant.
Yap Hoi Liong (Yap Hoi Liong & Co) in Criminal Appeal No Q-05–244–09 of 2012 for the third appellant.
Anthony Tai (Anthony Tai Advocate) in Criminal Appeal No Q-05–290–11 of 2012 for the fourth appellant.

Lailawati Ali (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] The appellants' appeals against conviction and sentence of life imprisonment for kidnapping came up for hearing on 16 April 2014 and upon hearing we dismissed the appeals. My learned brother Mohamad Ariff bin Mohd Yusof JCA and my learned sister Rohana bt Yusuf JCA have read the draft judgment and approved the same. This is our judgment.

PRELIMINARIES

[2] All the appellants' counsel conceded during the hearing of these appeals that there was extortion and not kidnapping. This part was eloquently taken up in the submission of the first appellant and reads as follows:

> (d) On the contrary, the learned judge in her grounds of decision under the heading 'Was there Ransom?' states clearly that 'the evidence shows that the accused persons did not call any relatives or friends of Madam Wong demanding for money for her release.' The learned judge further states that 'Instead, upon request by Madam Wong to let her call her relatives to fetch her son and daughter who were in school, the 3 accused ie the driver, threatened to kill her son and rape her daughter if Madam Wong did not do what they said ie to telephone her relatives and friends to deposit money into her or others bank accounts. This caused Madam Wong to plead with them tearfully not to hurt her children and that she would do whatever they wanted.' All these clearly show that the complainant was put in fear of injury to her children when money was demanded from her, if any, and at most it constituted the offence of extortion and not kidnapping. The charge of kidnapping against the 1st appellant therefore cannot sustain.

[3] The amended charge against the appellants reads as follows:

> Bahawa kamu bersama-sama pada 17.07.2010 jam lebih kurang 9.30 pagi bertempat di rumah No. 5A, Jalan Bruang, dalam Daerah Sibu di dalam Negeri Sarawak, bagi mencapai matlamat bersama, dengan maksud menahan Wong Tee Yong (P) (KPT: 630607-13-5144) untuk wang tebusan berjumlah RM250,000.00 (Ringgit Malaysia: Dua Ratus Lima Puluh Ribu). Maka dengan itu kamu telah melakukan kesalahan yang boleh dihukum di bawah Seksyen 3(1) Akta Culik 1961 dan dibaca bersama Seksyen 34 Kanun Keseksaan.

[4] The first appellant's petition of appeal, inter alia, reads as follows:

> 2.1 The 1st appellant has been wrongly convicted on a charge which was never preferred against her.

3.1 The learned Judge was wrong to have ruled that there was a prima facie case when the totality of the evidence at the end of the prosecution's case did not establish the essential ingredient of 'ransom' under section 3(1) of the Kidnapping Act 1961.

4.1 In determining whether an offence of kidnapping or any other lesser offence had been committed, the learned Judge had made the following erroneous to show her disagreement that a lesser offence had been committed as contented by the 1st appellant.

5.1 The learned Judge was wrong to have found that there was a common intention between the 1st appellant and all the accused persons to commit the offence charged when the circumstances of the case do not show that the 1st appellant was privy to the alleged abduction or that she was involved in any pre-arranged plan and further that she did not act in concert pursuant to the pre-arrange plan.

6.1 There is no evidence of the ingredient of 'ransom' as defined in section 2 of the Kidnapping Act 1961. The prosecution has failed to establish beyond reasonable doubt the most essential ingredient of ransom for the offence of kidnapping under section 3(1) of the Kidnapping Act 1961. The conviction is therefore unsafe.

[5] The second appellant's petition of appeal, inter alia, reads as follows:

(1) The learned High Court Judge was wrong to have called for the defence at the end of the prosecution's case when the prosecution's evidence did not establish a prima facie case.

(2) The learned High Court Judge was wrong to have called for the defence when the prosecution had failed to establish the ingredient of ransom an essential ingredients of section 3(1) of the Kidnapping Act 1961.

(3) The learned High Court Judge did not appreciate and understand the specific meaning of ransom and had misdirected herself on the law and principle relating to section 3(1) of the Kidnapping Act 1961 and even overlooked, ignored the definition of ransom as laid down in the High Court decision of *PP v Ini Abong & ors* [2009] 1 CLJ 5206 in respect of which there was no appeal.

(4) The learned High Court Judge failed to appreciate and apply the trite law principle that there is no prima facie case if any one of the essential ingredients is not establish as laid down in the case of *PP v Baldev Singh* [1985] 2 MLJ 453.

(5) The learned High Court Judge had failed to take into account the evidence of PW1 Wong Tee Yong.

(6) The learned High Court Judge had also failed to take into account the evidence of PW3.

(7) The learned High Court Judge failed to take into account the evidence of IO ASP Yeo Chin Shyan which show that PW1 had informed him.

(8) The learned High Court Judge had failed to re-evaluate and re-assess the prosecution case under section 182A.

(9) The learned High Court Judge was wrong in finding when she said that she disbelieved the 2nd accused and that the allegation of the 2nd accused was refuted by the behaviour of the 1st accused.

(10) The learned High Court Judge was wrong to have found that there was a common intention between all the accused persons to commit the offence charged when the circumstances of the case do not show that the appellant (Lu King Wen) was privy to the alleged abduction and that he was involved in any pre-arranged plan and further that he did not act in concert pursuant to the pre-arranged plan.

(11) The verdict is unreasonable and cannot be supported having regard to the evidence adduced.

[6] The third appellant's petition of appeal, inter alia, reads as follows:

(1) Yang Arif had erred in law and in fact when she decided that the appellant had intent to hold Wong Tee Yong for ransom under section 3(1) of Kidnapping Act 1961 and thereby failing to consider the fact that there was no ransom at all.

(2) Yang Arif had erred in law and in fact when she decided that the appellant had abducted or wrongfully confined or wrongfully restrained Wong Tee Yong under section 3(1) of Kidnapping Act 1961 without considering the fact that evidence discloses that it was one Sia How Tung who had abducted, confined or restrained Wong Tee Yong.

(3) Yang Arif had erred in law and in fact when she decided that the appellant had abducted or wrongfully confined or wrongfully restrained Wong Tee Yong with intent to hold her for a ransom of RM250,000.00 under section 3(1) of the Kidnapping Act 1961 without considering the fact that there was no ransom specified of the sum of RM250,000.00.

(4) Yang Arif had erred in law and in fact when she decided that the appellant had the common intention in abducting or wrongfully confining or wrongfully restraining Wong Tee Yong with intent to hold her for a ransom of RM250,000.00 under section 3(1) of Kidnapping Act 1961 and thereby failing to consider the fact that evidence shows one Sia How Tung who had abducted or restrained Wong Tee Yong.

(5) Yang Arif had erred in law and in fact when she failed to consider Wong Tee Yong's mistaken identification of another suspect as the appellant during the identification parades.

[7] The fourth appellant's petition of appeal, inter alia, reads as follows:

(1) The learned trial Judge has erred in law and ruled that there was a prima facie case when the totality of the evidence adduced at the end of the

prosecution's case did not establish the essential ingredients of the offence under Section 3(1) of the Kidnapping Act 1961 read together with Section 34 of the Penal Code.

(2) The learned trial Judge had completely misconceived the law under Section 3(1) of the Kidnapping Act 1961 where the learned Judge clearly failed to appreciate adequately or at all the meaning of 'ransom' as defined by Section 2 of the Kidnapping Act 1961.

(3) The learned trial Judge has also failed to direct her mind sufficiently or at all to the evidence of the prosecution's own witness PW37 (Chiew Yong Kiong) in her judgment.

(4) The learned trial Judge had also directed herself on extortion of money from PW1 in the trial and at most it is constituted the offence of extortion and not kidnapping.

(5) The learned trial Judge had erred in law and fact in which Her Ladyship had failed to appreciate and consider or at all the evidence of the complainant (PW1) and also the evidence of the other prosecution's witnesses.

BRIEF FACTS

[8] The learned trial judge had written an 80 page judgment setting out the facts and law inclusive of the defence of the appellants in detail. The learned deputy public prosecutor had summarised the facts and much judicial time will be saved by not repeating the same. The said summary reads as follows:

4.1 On 17 July 2010 at around 9.00 am, Wong Tee Yong (PW1) was driving to her son's school to collect her son's report card when her Toyota Camry car (QRC 9449) was knocked from behind. She alighted from the car and saw a man coming out from the car behind (QAP 1927) that knocked against her car. The man introduced himself as Andrew (later identified as 3rd accused) told PW1 that he would compensate her for the damage of her car. He also told her that the other passengers in his car were his siblings.

4.2 The 3rd accused told PW1 that his cousin had a workshop and he could send her car there that same day for repair. After the 3rd accused's persuasion PW1 agreed to let Andrew's alleged sister and brother (later identified as 1st and 4th accused respectively) accompany her to the school to collect the son's report card and then send the car for repair. After collecting the son's report card, the 4th accused told PW1 the location of the workshop and while they were on the way to the workshop, the phone of the 4th accused rang. After talking on the phone, 4th accused told PW1 that he could help to send the car to the workshop after sending her home first. He then asked her to drive the car to a particular Petronas petrol kiosk.

4.3 When the car reached the Petronas petrol kiosk, PW1 saw that the 3rd accused was already there. The 3rd accused told PW1 to get into his car as he would send her home while the 1st accused would send PW1's car to the workshop. PW1 surrendered her car key to the 1st accused before getting into the 3rd accused's car.

4.4 Upon getting into the 3rd accused's car, PW1 noticed the presence of (3) men — 3rd accused (as driver) and 2 other men. Later the 4th accused also got into the car and sat beside PW1.

4.5 After driving a short distance, the 3 accused suddenly snatched PW1's handbag that was on her lap while the front seat passenger pushed her head down. The two men sitting beside her grabbed her hands, pulled them behind her back and tied them, they also gagged her mouth and tied her legs. They blind folded her and made her 'lie face down'.

4.6 The car continued to travel for some distance before PW1 heard the sound of an automatic gate open. She was then placed inside a gunny sack, lifted up and brought inside a house.

4.7 While inside the house, PW1 was placed face down on a mattress on the floor, the gunny sack was opened and the gag was removed. She was blindfolded. They proceeded to forcefully remove her ring, necklace and watch. When PW1 asked them why they brought her there, a person who sounded like the 3rd accused told her that his father was hospitalized and he needed RM250,000.00 to save his father's life.

4.8 PW1's three ATM cards and credit cards were taken away from her and PW1 was asked to tell them the pin number of the ATM, which she did. Thereafter she heard the sound of a motorcycle leaving the house. They made her sign a few signatures and then imitated her signature as she heard a man asking 'Does it look similar?'

4.9 Meanwhile PW1 begged them not to hurt her and to allow her to call her relatives to fetch her younger daughter from school. They allowed her to make the call provided that she sounded normal and that she must not let them know that she had been kidnapped. They said if she did not follow what they said, they would fetch her daughter and rape her, and also kill her son. PW1 begged them not to do that and that she would do whatever they asked.

4.10 Thereafter, through the gap below the blindfold, PW1 could see that they took the SIM card out from her i-phone and put it into their phone. They then dialled the number given by PW1 and gave the phone to PW1 to talk to her relative, Anna, to request her to fetch her daughter from the school. They switched the phone to the speaker mode so that they could hear the conversation between PW1 and Anna.

4.11 Thereafter they made PW1 telephoned many of her relatives to ask them to bank money into either her bank account or the accounts

given by them. Then they went to withdraw the money from various bank accounts with the ATM cards.

4.12 They also bought gold using PW1's credit card.

4.13 PW1 was subsequently released in the evening of the same day. The accused told her that they had left a black colour bag inside her car and instructed her to throw it into a drain. PW1 saw a Toshiba laptop that was left in her car and she threw it into a dustbin.

4.14 On the next day PW1 made a police report. An investigation ensued where on 21 July 2010 the 1st accused went to the Central Police Station, Sibu and was subsequently arrested.

4.15 On 22 July 2010, the police arrested 9 other persons including 2nd, 3rd and the 4th accused in a house at No. 5A Bruang Road, Sibu.

[9] All the counsel for the appellants agreed that the first appellant's counsel will lead and others will if necessary highlight issues relevant to their clients.

[10] Learned counsel for the first appellant summarises the complaint to four issues, inter alia, (i) the charge was unknown to the appellant; (ii) ransom not clearly made out; (iii) failure to convict for lesser charge of extortion; (iv) no common intention.

CHARGE UNKNOWN TO THE APPELLANT

[11] On the first issue learned counsel for the first appellant summarises the submission as follows:

2.1 The 1st appellant has been wrongly convicted on a charge which was never preferred against her, in that:

(a) The original charge and the amended charge which the 1st appellant was asked to take the plea both specifying that the ransom sum to be RM250,000.00.

(b) However, the charge that was considered by the learned Judge as appeared in her Grounds of Decision was from nowhere and it specified a ransom sum of RM53,400.00. Up till now, the 1st appellant does not know how does this figure of RM53,400.00 come about.

(c) Hence, the charge stated in the Grounds of Decision of the learned Judge which the 1st appellant has now been convicted was never preferred against her and no plea was ever taken on the said charge thus rendering the trial a nullity and the resulting conviction of the 1st appellant a travesty of justice.

(d) Furthermore, there is no iota of evidence led by the prosecution in the trial to show that the appellants did demand the said ransom sum of RM53,400.00 from PW1, the complainant. None of the prosecution's witnesses had testified to that effect.

(e) The 1st appellant was prejudiced as she was ordered to enter defence on an unknown charge to her.

(f) If the RM53,400.00 was based on the alleged amount received, then it is an offence of knowingly receiving ransom under section 5 of the Kidnapping Act 1961 which attracts only a lighter sentence of imprisonment not exceeding 10 years and shall also be liable to whipping.

[12] We do not find merit in the submission or the technicalities raised. The law does not require the exact sum asked or paid to be stated in the charge. The exact sum is not also an element of the offence. Section 2 of the Kidnapping Act 1961 defines ransom as:

> 'ransom' means any money, price or consideration paid or demanded for the release of a person abducted or wrongfully confined or wrongfully restrained.

Section 3 states:

> 3(1) Whoever, with intent to hold any person for ransom, abducts or wrongfully confines or wrongfully restrains such person shall be guilty of an offence and shall be punished on conviction with death or imprisonment for life and shall, if he is not sentenced to death, also be liable to whipping.

[13] In essence, once a person is abducted and ransom is asked for release, a charge under s 3 is attracted. There are ample evidences to say s 3 is applicable and it does not really matter what the learned trial judge had to say and that cannot be taken up as technical issues to obtain an acquittal unless it can be shown a miscarriage of justice has occurred in consequence of any error or omission of the trial judge. In addition, the apex court is obliged not to intervene when there are sufficient evidence to justify the charge pursuant to s 60 of the Courts of Judicature Act 1964.

RANSOM CLEARLY NOT MADE OUT

[14] On the issue, learned counsel for the first appellant says there was no evidence that the money allegedly demanded was as consideration for the release of the complainant. This issue is related to the 'preliminaries' which we have stated earlier, and the money asked was for the purpose not to harm the victim's children.

[15] We find it difficult to comprehend this line of argument. Common sense will dictate if not for the ransom she will not be released. Conduct and

motive under s 8 of the Evidence Act 1950 will clearly bring nexus to the demand, consideration and the release of the victim. The conduct of the appellants on this issue is inextricably interwoven to anchor the charge as well as culpability. This is not a case where the ransom has no nexus to her release.

FAILURE TO CONVICT FOR LESSER CHARGE OF EXTORTION

[16] On this issue learned counsel summarised the submission as follows:

> 4.1 In determining whether an offence of Kidnapping or any other lesser offence had been committed, the learned Judge had made the following erroneous finding to show her disagreement that a lesser offence had been committed as contented by the 1st appellant:
>
> (a) It is not a case of Madam Wong being wrongfully confined, that is, being totally prevented or restrained from proceeding in any direction and then extorted.
>
> (b) It is not a case of Madam Wong being confined in the sense of being deprived of liberty — partial of total — to move in a particular direction. She was actually abducted by deceitful means.
>
> (c) The learned Judge failed to appreciate that her finding that Madam Wong was actually abducted by deceitful means was in the context under Section 362 of the Penal Code (offence for Abduction) and is applicable for the offence under Sections 364, 365, 366, 367, 368 and 369 of the Penal Code. All of such sections referred to kidnapping under Section 359 of the Penal Code which has no relevance to the circumstances of the charge referred against the accused persons.
>
> (d) The learned Judge failed to appreciate that the fact of the abduction even by the deceitful means do not IPSO FACTO constitute Kidnapping under Section 3(1) of the Kidnapping Act 1961.
>
> (e) The ingredients of Abduction and Wrongful Confinement by themselves are insufficient to prove Kidnapping under Section 3(1) of the Kidnapping Act 1961 and they are only one ingredient of the offence.
>
> (f) The learned Judge was also wrong by referring to Section 359 of the Indian Penal Code for the meaning of 'Kidnapping' having found that the Kidnapping Act 1961 does not define the word 'kidnap'.
>
> (g) Section 359 of the Indian Penal Code refers to Kidnapping from India or from lawful guardianship which section is irrelevant to the circumstances of our case. (See *Ratanlal & Dhirajlal's The Indian Penal Code*, Section 359).

[17] We do not find any merit in this line of submissions. There is no duty and obligation for the trial judge to consider a lesser offence when the evidence is sufficient to attract s 3 of the Kidnapping Act 1961. This is not a case where the prosecution has offered an alternative charge. The obligation to consider a

lesser charge will only be applicable if the prosecution had not established its case beyond reasonable doubt as per the charge but the learned trial judge takes the view that there are sufficient evidence to attract a lesser charge. The law does not permit the appellant to demand a lesser charge when the prosecution has established its case beyond reasonable doubt as per the charge.

NO COMMON INTENTION

[18] On the issue of common intention, learned counsel says that the first appellant was not privy to the alleged abduction or that she was involved in any prearranged plan, etc. And learned counsel summarises the submission as follows:

> 5.2 There was a lack of judicial appreciation on the part of the learned Judge on the following evidence which would otherwise deny common intention on the part of the 1st appellant in the alleged kidnapping:
>
> (a) The learned Judge had failed to appreciate the 1st appellant's evidence that she was also the victim of a crime who had been confined in the house subject to brutality and sexual abuse by the 3rd accused/3rd appellant which evidence was clearly supported by the Deputy Public Prosecutor during the cross-examination of the 3rd accused when it was put by the DPP to the 3rd accused/3rd appellant's allegation that the 1st appellant namely Ting Khai Sin was not abused physically and sexually by him was not true.
>
> (b) The fact that the 1st appellant was abused physically by the 3rd accused/3rd appellant has also been corroborated by the evidence of the prosecution's own witness PW37 Chew Yong Kiong. The said PW37 testified that the 1st appellant was still very frightened the day when PW37 saw the complainant was taken to the house. There was no direction at all on this part of PW37's evidence by the learned Judge, thus there is a serious misdirection by way of non-direction which has occasioned a miscarriage of justice.
>
> (c) The learned Judge had also failed to warn herself on the danger in accepting the bare allegation of the complainant (PW1) (by merely judging from the voice and hand-look as she was blindfolded at all material times) that it was the 1st appellant who was present in the room where the complainant was allegedly confined and that it was the 1st appellant who talked to the complainant, pressing the telephone numbers, texting and sending text messages in the room. There was no direction at all that the complainant was only making an assumption when she testified that it was the 1st appellant who spoke to her in the room as evidently the complainant could neither remember the voice of the said lady who spoke to her nor could she remember how the hand that pressed the telephone and text messages looked like during the trial. The complainant's evidence in this respect is so shaky and unreliable.

(d) The above evidence, if properly appreciated, would have shown that the 1st appellant was indeed a victim of a crime too and she was not a party to the concerted plan in the alleged kidnapping of PW1.

[19] It is trite for common intention to apply, prearranged plan is not necessity element. What is important in this case is that the first appellant has nexus and participated in the conduct of the other appellants during the relevant period of the crime to attract criminal liability. The evidence does not exonerate the first appellant at all from the crime. In *Ravindran a/l Ramasamy v Public Prosecutor* [2013] 4 MLJ 665 on common intention, the Court of Appeal through Hamid Sultan bin Abu Backer JCA had this to say:

[i] What is important to note, under s 3A of the FIPA 1971 and s 34 of the Penal Code which deals with common intention is that one need not be the principal offender to be liable for the offence. Association in the crime and failing to show satisfactory dis-association from the crime or principal offender will attract the charge as well as the sentence as per decided cases in this area of jurisprudence.

[ii] It is well settled that for the prosecution to succeed in relation to a charge under s 3A of the FIPA 1971 it has to establish five essential elements of the offence, namely:

(iii) the said scheduled offence was committed;

(iv) the accused was an accomplice;

(v) the accused was present at the scene of the robbery;

(vi) the firearm was discharged within the meaning of s 2 of the FIPA 1971.

(vii) *the accused may reasonably be presumed* to have known that the person who discharged the firearm was carrying the same. (Emphasis added.) The burden to disprove is one on the balance of probabilities as imposed by s 3A of the FIPA 1971,

[i] In *Public Prosecutor v Choo Chuan Wang* Edgar Joseph JR J (as he then was) had this to say:

Thus, the onus is passed to the accused to prove, on the *balance of probabilities* that he had taken all reasonable steps to prevent the discharge of the firearm concerned. (Emphasis added.) However, the accused's bare denial that he was a party to the robbery and his conduct at the scene of the crime could not possibly discharge the onus which lay upon him.

[ii] Having said that, it must be noted that s 34 does not provide such a high burden on the accused. However, there must be some evidence at the trial either at prosecution stage or defence stage to show that the accused at the time of the incident had dis-associated from the criminal act to be relieved from s 34. For example, if several persons have joined hands to assault a person by hand and suddenly one of the accomplice takes a knife to assault, any accomplice who attempts to stop the other from using the

knife or moves away from the incident will not be charged for murder or culpable homicide in the event the knife was used to kill the victim. The only offence at all the accomplice may face is for assault (see *Joginder Ahir v State* AIR 1971 SC 1834).

[iii] The difference between s 3A of the FIPA 1971 and s 34, inter alia, is that the threshold burden for the prosecution to establish the case is low and the burden to disprove the case for the accused is on the balance of probabilities (high threshold). However, when s 34 is relied on the threshold burden is high for the prosecution and burden on the defence is low, ie need not disprove on the balance of probabilities, and it will be sufficient if the defence cast a reasonable doubt. Further, the existence of a common intention among the participants in a crime is the essential element for the application of s 34 and in the absence of such common intention, the section has no application, (see *Ashok Kumar v State of Punjab* AIR 1977 SC 109). It is also well settled in relation to s 34 that at times it is difficult if not impossible to procure direct evidence to prove the intention of an individual. In most cases it has to be inferred from his act or conduct or other relevant circumstances of the case, (see *Suresh v State UP* (2001) SCC). On similar note the position under s 3A of the FIPA 1971 is not only the same but the threshold for the prosecution to satisfy this requirement is placed much lower than s 34.

[iv] Mere denial of knowledge would not per se be sufficient to satisfy the burden placed under s 3A of the FIPA 1971. Mere denial also will not be sufficient to relieve the accused of the elements of s 34 of the Penal Code.

[20] We have also considered the written submissions of the other learned counsel in detail and we find no merit.

[21] All learned counsel heavily relied on the case of *Public Prosecutor v Ini Abong and other trials* [2008] 8 MLJ 106; [2008] 1 LNS 526. That part of their submission by the fourth appellant reads as follows:

(c) In the case of *PP v Ini Abong & ors* [2008] 1 LNS 526, His Lordship Dr. Hamid Sultan Abu Backer (as he then was) has explained extensively the definition of ransom which is now reproduced as below:

'any sum or consideration without consideration' His Lordship went on to hold that:

'the section used the word money, and also consideration. Established dictionaries also support my proposition and the payment is said for the release ie the consideration is for the release and not otherwise to constitute ransom.'

It is patently clear that to constitute 'ransom', it must be for the release of the body of the complainant.

[22] In the instant case it cannot be denied that the ransom has nexus to the release of the victim. If it has no nexus it will not attract s 3 of the Kidnapping Act 1961.

[23] It is well settled that it is in the hands of triers of facts to assess the quality of evidence and to determine whether the evidence on record justifies a conviction as well as sentence. We have perused the evidence in detail and we are satisfied that there are sufficient material to support the charge and the view taken by the trial court on the relevant issues in our view was a reasonable view of the evidence on record, and the court had followed *Radhi*'s direction and rightly applied the maximum evaluation and beyond reasonable doubt test, (see *Public Prosecutor v Mohd Aszzid Abdullah* [2008] 1 MLJ 281; *Tong Kam Yew & Anor v Public Prosecutor* [2013] 4 MLJ 888; *Chin Kek Shen v Public Prosecutor* [2013] 5 MLJ 827).

[24] In conclusion we find the appeals have no merit. The appeals are dismissed and we affirm the decision of the High Court.

[25] We hereby order so.

Appeal dismissed.

Reported by Afiq Mohamad Noor